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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No....71-4911

RICHARD KENICHI KANESHIRO,
also known as RICHARD HIGA,
and GEORGE EKITA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioners, Richard Kenichi Kaneshiro, also known as Richard Higa, and George Ekita, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A, and is not as yet officially reported.

JURISDICTION

The opinion attached as Appendix A was dated June 1, 1971, a timely Petition for Rehearing was filed on June 25, 1971, and on August 10, 1971, the Court of Appeals entered its Order denying the Petition for Rehearing. On August 20, 1971, the Court of Appeals entered its Order staying issuance of mandate pending the filing of a petition for writ of certiorari in the office of the Clerk of the Supreme Court of the United States on or before September 10, 1971. Thereafter, and

on September 13, 1971, Honorable James M. Carter, Circuit Judge of the United States, issued an Order staying issuance of Mandate provided a petition for writ of certiorari was filed by Petitioners herein in the office of the Clerk of the Supreme Court of the United States on or before October 5, 1971. This Court's jurisdiction is invoked upon 28 U.S.C. §1254, and upon Rule 37(b) of the *Federal Rules of Criminal Procedure*.

QUESTIONS PRESENTED

Petitioners were indicted, tried by a jury and convicted of transporting firearms in foreign commerce without a license and of conspiracy to transport firearms in foreign commerce without a license, both in violation of 15 U.S.C. §902(a).

1. Does an indictment charge a crime when it fails to set forth an essential element of the offense, to wit, that the Petitioners were "manufacturers" or "dealers" as the terms are defined and used in 15 U.S.C. §§901(4) and (5) and §902(a)?

2. Does the fact that the indictment

alleges the acts of the Petitioners were "in violation of" the statute cure the failure to allege all of the elements of the crime charged?

3. Is there evidence of record that the Petitioners were "manufacturers or dealers" within the meaning of 15 U.S.C. §902(a)?

4. Was it harmless error to allow the admission of a defendant's statement made to a Federal officer during a customs' search where a full "*Miranda*" warning and statement had not been given the defendant by the officer?

5. Did the trial court err in denying Petitioners' motion for a mistrial where a Federal officer, testifying in behalf of the Government, gratuitously and improperly stated that one of the Defendants was known by his office to be involved in the local underworld?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The *Constitution of the United States*,

Fifth Amendment, provides in pertinent part as follows:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The *Constitution of the United States*, Sixth Amendment, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel

for his defense."

Federal Rules of Criminal Procedure, Rule 7(c):

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

15 U.S.C., §902(a):

> "It shall be unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this chapter, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce."

15 U.S.C., §901(4) and (5):

> "(4) The term 'manufacturer' means any person engaged in the manufacture or importation of firearms, or ammunition or cartridge cases, primers, bullets, or propellent

powder for purposes of sale or distribution; and the term 'licensed manufacturer' means any such person licensed under the provisions of this chapter.

(5) The term 'dealer' means any person engaged in the business of selling firearms or ammunition or cartridge cases, primers, bullets or propellent powder, at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach mechanisms to firearms, and the term 'licensed dealer' means any such person licensed under the provisions of this chapter."

STATEMENT OF THE CASE

On May 19, 1969, the Petitioners were named as defendants in an indictment in two counts wherein the Federal Grand Jury char-

ged them with violation of §902(a) of Title 15, U.S.C., and of conspiring with one Nyuk Lin Loo, also known as Clarence Lin Loo, to violate §902(a) of Title 15, U.S.C. The indictment listed four overt acts performed or committed by Petitioners in furtherance of the conspiracy with which they were charged under Count Two. Those overt acts are as follows:

> (a) That sometime in May 1967, the exact date not known to the Grand Jury, Defendant Richard Kenichi Kaneshiro, also known as Richard Higa, had a conversation with Raymond Tom in which defendant Richard Kenichi Kaneshiro, also known as Richard Higa, asked Raymond Tom to facilitate a shipment of baggage outside the regular process for baggage handling.
>
> (b) That sometime in June 1967, the exact date not known to the Grand Jury, defendants George Ekita, and Richard Kenichi Kaneshiro, also known as Richard Higa, met with Raymond

Tom at the International Airport.

(c) That on or about June 5, 1967, defendant George Ekita purchased a ticket to Japan.

(d) That on or about June 13, 1967, Richard Kenichi Kaneshiro, also known as Richard Higa, had a conversation with Raymond Tom in which he designated baggage to be sent to Japan.

Petitioners have pleaded not guilty and on May 22, 1970, a jury entered verdicts of guilty against both Petitioners on each of the two counts of the indictment.

The factual background out of which the indictment arose is succinctly set forth in the Opinion of the United States Court of Appeals for the Ninth Circuit attached hereto as Appendix A. Prior to the issuance of the indictment, Petitioner Ekita, as he arrived at the Honolulu Airport from Tokyo, was taken into a special search room where he was frisked and his luggage

searched, and his passport and airline ticket were confiscated by one Phillip Piper, a Treasury Agent. Phillip Piper testified that he gave Petitioner Ekita a "*Miranda*" warning omitting to inform the Petitioner that if he could not afford an attorney, one would be appointed to represent him prior to making any statement. Over the objection of counsel for Petitioners, the Court allowed the introduction of an admission of Petitioner Ekita, which in effect confirmed Petitioner Ekita's participation in the overt act (b) set forth hereinabove. On cross-examination, the same Treasury Agent, Phillip Piper, in response to a question by counsel for Petitioners, stated that his office was aware that George Ekita was known to be involved in the "local underworld".

REASONS FOR GRANTING THE WRIT

I

AN IMPORTANT QUESTION OF INTERPRETATION OF A FEDERAL STATUTE AND RULE 7 OF THE

FEDERAL RULES OF CRIMINAL PROCEDURE IS INVOLVED.

In its decision the Court attempts to distinguish the indictment in this case from that found in *Carlson v. United States*, 296 F.2d 909 (9th Cir., 1961), cited by Petitioners in their opening brief, upon the ground that in the instant case the indictment directly charged Appellants with "violation of §902(a) of Title 15, United States Code," while in the *Carlson* case, there was no reference in the body of the information to the statute alleged to have been violated, only a marginal notation. The reference in the indictment to §902(a) does not, however, cure or excuse the omission in the indictment of an essential element of the crime charged, that Petitioners were "manufacturers" or "dealers". At best it states a mere conclusion of law and adds nothing to the indictment.

The Federal courts have long held that an indictment which does not allege all of the elements of the crime is not cured by an allegation that what was done was "in violation of" the statute. In *The Hoppet*

v. United States, 7 Cranch 389, 3 L.Ed. 380 (1913), Chief Justice Marshall stated:

> "It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty in-

troduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession.

* * *

. . . But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute."

See also, *Keck v. United States* (1898) 172 U.S. 434,437, 19 S.Ct. 254, 43 L.Ed 505; *Sutton v. United States* (5th Cir., 1946) 157 F.2d 661.

A reference in the indictment that

what was done was "in violation of" a statute or regulation is not an allegation of the fact but a legal conclusion of the pleader and constitutes no part of the description of the offense. *Alabama Packing Company v. United States* (5th Cir., 1948) 167 F.2d 179.

Petitioners urge that §902(a) is not violated in every instance where firearms are transported, shipped or received in interstate or foreign commerce without a license, that a violation of §902(a) occurs only if the prohibited acts are done by an unlicensed person belonging to the class designated "manufacturer" or "dealer", that the indictment must specifically allege that the Petitioners were either manufacturers or dealers, and that for failure to so allege, the indictment in this case must fail.

In sustaining the faulty indictment in this case, the Court below overlooked its earlier decision in *Johnson v. United States* (9th Cir. 1924) 294 F. 753, where, as in the case at bar, the indictment failed to allege that the defendant was a member of the class of persons specifically designated in the statute. The Court stated succinctly:

". . . [B]ut it would seem

> upon principle, as well as upon authority, that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law . . . ."

The conclusion is inescapable that Petioners were charged, tried and convicted on the false premise that under §902(a), it was immaterial whether they were dealers or manufacturers, that the mere transporting of firearms from Hawaii to Japan constituted a violation of the law.

To supply the essential element omitted from the indictment, that the Petitioners were "dealers," the Court below seizes upon the phrase "in foreign commerce," which is alleged in the indictment, and argues that the transaction was a business venture which necessarily involved a dealer. The Court below then concluded that the presence of the missing essential element "could properly be implied." By a similar process of

argument, the Court below also found that a single isolated transaction is sufficient to hold the Defendants were "engaged in the business of selling firearms" and, therefore, were "dealers" within the meaning of 15 U.S. C., §901(5). Such a strained construction of the plain language of the indictment and of the applicable statute does violence to the standards established by the Supreme Court under the *Fifth Amendment of the Constitution:*

> ". . . The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The ommission cannot be supplied by intendment or implication, and the charge must be made directly, and not

inferentially or by way of recital.

United States v. Hess (1888) 124 U.S. 483,486, 8 S.Ct. 571,573, 31 L.Ed. 516,517. See also, *United States v. Schneiderman* (D.Cal. 1951) 102 F.Supp. 87.

A review of the trial transcript will show that a copy of the defective indictment was delivered into the hands of the jury during its deliberations.

II

THE ADMISSION OF DEFENDANT GEORGE EKITA'S STATEMENT TO A TREASURY AGENT AFTER A DEFECTIVE *MIRANDA* WARNING, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, WAS NOT HARMLESS ERROR.

Harrington v. California (1969) 395 U.S. 250, cited by the Court below, reaffirms the

policy enunciated in *Chapman v. California* (1967) 386 U.S. 18, that before a constitutional error can be declared harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. The Court also stated that there was little or no difference of that holding with their holding in *Fahy v. Connecticut* (1963) 375 U.S. 85, that before an error can be determined harmless, it must be determined "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In *Harrington v. California, supra,* the court, while acknowledged the applicability of the Sixth Amendment confrontation clause to defendant's appeal held that the error was harmless in view of the overwhelming case against the defendant.

In *United States v. Higuchi* (9th Cir., 1971) 437 F.2d 835,837, the defendant alleged error similarly as in the instant case, in the admission of testimony of the defendant without a *Miranda* warning. The court held the error harmless because the

defendant did not object to the testimony at trial and in fact tried to use it to substantiate his own case.

The Petitioners here recognize the applicability of *Harrington v. California, supra,* although the factual evidence arrayed against the defendant there is not known. *United States v. Higuchi, supra,* is distinguishable because the defendant therein sought to use the testimony asserted as error for his own benefit.

Using the test suggested in *Chapman v. California, supra,* and *Fahy v. California, supra,* it is difficult to see any evidence implicating Petitioner Ekita as part of the conspiracy if the alleged admission of Petitioner Ekita to a customs agent that he was present at a meeting of Nyuk Lin Loo, Raymond Tom, and Petitioner Kaneshiro prior to shipping baggage to Japan in June, 1967, was excluded. It must be re-emphasized that the conspiracy in the instant case related to the transportation in foreign commerce, of guns by persons who were manufacturers and dealers within the meaning of Chapter 18, 15 U.S.C.

and who did not have licenses for that purpose. The involvement of Petitioner Ekita, as indicated in the Opinion of the Circuit Court, in the attempted sale of guns in Japan, had no relevancy to the charge of the indictment. The major overt act listed in the indictment was the alleged meeting together of Nyuk Lin Loo, Raymond Tom, and Petitioners Kaneshiro and Ekita, in June, 1967, prior to the shipment of the guns. The transcript will show that only Petitioner Ekita's alleged admission to Customs Agent Phillip Piper showing his involvement in this major overt act, evidenced the conspiracy.

III

THE APPELLATE COURT DID NOT CONSIDER THE FULL ADVERSE IMPACT OF CUSTOM AGENT PIPER'S STATEMENT THAT "EKITA WAS KNOWN TO BE INVOLVED IN THE LOCAL UNDERWORLD" AND WHETHER CUSTOM AGENT PIPER WAS PLACED IN A POSITION WHERE HE COULD ONLY MAKE SUCH A RESPONSE IN DENYING A MOTION FOR MISTRIAL.

The statement made by Custom Agent Phillip Piper was an extremely adverse and damning characterization of the Petitioners. In the presence of the jury, it could have the consequence of prejudicing their view towards the Petitioners. The Court below has upheld the refusal of the trial court to declare a mistrial by stating that the answers came in reply to pointed questions of counsel.

The record will show that Petitioners' counsel, however, was conducting the questioning to determine the legality of the search and detention when Petitioner Ekita arrived in Honolulu from Tokyo in November, 1962. Under the holdings of cases such as *United States v. Dela Cruz* (7th Cir. 1970) 420 F.2d 1093, and *United States v. Berard* (D.Mass., 1968) 281 F.Supp. 328, Petitioner would have been entitled to determine whether the search made by customs personnel was reasonable. The questioning conducted by counsel was directed towards that end and not to bring in extraneous prejudicial matters. A balanced view of the validity of Customs Agent Piper's response would be to ask, "Was this the only reasonable response that could have been given?" We

believe not, as the witness could have responded factually rather than in an inflamatory sense.

United States v. Parhms (9th Cir., 1970) 424 F.2d 152, cited by the Court below, can be distinguished on its facts. There, one of the errors assigned was the failure of the trial court to declare a mistrial when a witness for the prosecution referred to a police photograph as a "mug shot." The court rejected the argument saying the error was of trivial importance. In the instant case, however, the statement by Agent Piper characterized the Petitioners as members of the most repulsive and abhorrent class of society, a far more serious defect. As such, the Court below should have protected the rights of the Petitioners by declaring a mistrial once the statement was made.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD KENICHI KANESHIRO, a.k.a. Richard Higa, and GEORGE EKITA, Appellants,	)	No. 26,273
v.	)	
UNITED STATES OF AMERICA, Appellee.	)	

[June 1, 1971]

Appeal from the United States District Court
District of Hawaii

Before: KOELSCH, CARTER and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

Appellants were indicted, tried by a jury and convicted of transporting firearms in foreign commerce without a license and of conspiracy to transport firearms in foreign commerce without a license, both in violation of 15 U.S.C.

§902(a). They appeal. We affirm.

Factual Background

Appellant Kaneshiro was employed as a baggage and cargo handler for Pan American Airways. In May, 1967, in Tokyo, Japan, he and an acquaintance, Nyuk Lin Loo, entered into a joint venture with a Tokyo resident, Townsend, to ship guns from Hawaii to Japan and there sell them. Upon returning to Honolulu, Kaneshiro obtained six or seven new pistols, put them in a suitcase, and contacted Raymond Tom, the cargo supervisor for Pan American. Kaneshiro told Tom that the suitcase was excess baggage belonging to Loo, and asked Tom's help in shipping the suitcase to Tokyo in the near future. The ostensible purpose behind seeking Tom's assistance was to help Loo avoid paying an excess baggage charge. Tom agreed to ship the suitcase, provided it did not contain any contraband. Kaneshiro assured him it did not.

In early June, 1967, Kaneshiro,

Loo and another man, identified by Tom as appellant Ekita, met Tom at the airport to discuss plans for the shipment of the suitcase. After this meeting, Ekita went to Tokyo where he contacted Townsend to prepare for marketing the pistols. During this time Kaneshiro was completing arrangements for the shipment.

On June 13, 1967, Kaneshiro told Tom that he had Loo's suitcase, together with two cases of pineapples, ready to go. Tom placed the suitcase and pineapples on a Pan Am flight to Tokyo, and Loo departed for Tokyo on a different flight. The suitcase arrived as planned, and was unloaded by Chujo, another Pan Am cargo handler, whom Tom had contacted. The guns were then picked up by Ekita, Loo and Townsend, who began looking for buyers. One pistol was sold to a person named Tanaka, and, after much difficulty, arrangements were made to sell the remaining guns to a person named Okaji. Before the sale was consummated, however, all parties

were arrested by the Tokyo police. In Honolulu, Tom learned of the arrest, and asked Kaneshiro if the suitcase contained guns. Kaneshiro replied in the affirmative, and said that a taxi driver was going to "take the rap." Kaneshiro was eventually arrested, and he and Ekita were charged as co-defendants with the offenses set forth in the indictment. Loo died prior to the trial.

Issues

Although appellants raise a multiplicity of issues, only the following questions merit discussion: (1) the sufficiency of the indictment; (2) the sufficiency of the evidence; (3) the adequacy of the court's instructions; (4) the receipt in evidence of certain statements made by appellants; (5) the admission into evidence of an extrajudicial written statement given by Tom to a customs agent; (6) the trial court's refusal to grant a mistrial; and (7) the trial court's refusal to give a "cautionary" instruction requested by appellants.

(1) Appellants were charged with violating 15 U.S.C. §902(a), which makes it a crime ". . . for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this chapter, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce." Count I of the indictment charged that appellants ". . . willfully and knowingly did transport and cause to be transported in foreign commerce from . . . Hawaii to Tokyo . . ." certain firearms without a license; Count II charged charged that appellants conspired with Loo to commit the above crime.

Relying primarily on *Carlson v. United States*, 296 F.2d 909 (9th Cir. 1961), appellants claim that the indictment failed to charge a crime because it omitted an essential element of the offense proscribed by §902(a), namely, that appellants were "manufacturers" or "dealers" within the meaning of that section. In *Carlson*, an amended infor-

mation charged the defendant with willfully giving false information to an airline stewardess concerning an attempt to place explosives on a commercial aircraft. The information failed to include an essential element of the offense charged, i.e., that the defendant told the stewardess that the explosives had been placed with intent to damage or destroy the plane. This court held that the information failed to charge a crime, and reversed the conviction.

Carlson is distinguishable from the instant case in two important respects. There, there was no reference in the body of the information to the statute allegedly violated, but only a marginal notation.[1] Here, each count directly charged appellants with a "violation of §902(a) of Title 15, United States Code." Hence, the appellants, unlike the defendant in *Carlson*, were fully apprised of the nature of the charges against them. Secondly,

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[1] An examination of the information reveals this fact.

counsel for appellants had an excellent chance to call the trial court's attention to the alleged defect in the indictment at the time he was discussing with the court and the prosecutor the instructions to be given. Not only did counsel fail to object to the defect, but the record shows that he affirmatively assisted in preparing the instruction on the essential elements of the crimes and made no attempt to include a definition of the term "dealer" or "manufacturer" in the instruction. There was no such record before the court in *Carlson*.

While the indictment in our case is obviously an example of poor draftsmanship, we do not think it is fatally defective. The indictment is here being challenged for the first time. This fact alone does not preclude our consideration of its sufficiency. *Carlson v. United States*, *supra*, but under these circumstances the standard for sufficiency is ". . . that the necessary facts appear in any form or by fair construction can be found within the terms of the

indictment." *Hagner v. United States*, 285 U.S. 427,433 (1932); *Ramirez v. United States*, 318 F.2d 155,157 (9th Cir. 1963). Here, the indictment alleged that the firearms were unlawfully transported "in foreign commerce." The phrase "interstate or foreign commerce" is defined in 15 U.S.C. §901(2) to mean ". . . commerce between any State, Territory or possession (not including the Canal Zone), or the District of Columbia, and any place outside thereof . . ." Commerce, in turn, has been defined as ". . . trade: business in which persons [have] bought and sold, bargained and contracted." *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533,539 (1944). A dealer is defined in 15 U.S.C. §901(5) as ". . . any person engaged in the business of selling firearms or ammunition . . ." Thus, the phrase "in foreign commerce" suggests that the transactions was a business venture which necessarily involved a dealer. Moreover, the appellants were in no way prejudiced by the inartful wording of the

indictment. As mentioned above, both counts contained express allegations charging violations of the statute. On such a record, the missing statutory elements could properly be implied. *Ramirez v. United States, supra; Stein v. United States*, 313 F.2d 518 (9th Cir. 1962).

(2) Next, appellants contend that there was no evidence, outside of the single shipment of guns to Tokyo, from which the jury could reasonably have inferred that either of them was a dealer. An isolated transactions, while not in itself a business, is, nevertheless, evidence to be considered in determining whether the seller is engaged in a business. *Bush v. United States*, 218 F.2d 223 (10th Cir. 1954); *Supreme Malt Products Co. v. United States*, 153 F.2d 5 (1st Cir. 1946). In the instant case, the shipment of guns to Tokyo, the activity of Ekita, Loo and Townsend in procuring, with Kaneshiro's knowledge and approval, possible buyers for the guns, and the fact that the guns were sole in two separate installments to two different

people, is ample evidence to support a finding that appellants were "engaged in the business of selling firearms" and were to that extent dealers under §901 (5).

(3) Directly related to the foregoing is appellants' claim that the trial court erred in its instructions in failing to define the term "dealer" or to inform the jury that §902(a) is applicable only to dealers or manufacturers of firearms. At the outset, we note that the trial judge prefaced his instruction by reading the entire section to the jury. More importantly, we emphasize that the attacked instruction not only was not objected to at the trial, but indeed was given as revised by the appellants themselves. On these facts, Rule 30, FRCrimP, precludes appellants from attacking an instruction which they helped compose.[2]

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[2] "No party may assign as error any portion of the charge or *omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The giving of the instruction was not, as appellants urge, plain error under *Herzog v. United States*, 235 F.2d 664 (9th Cir. 1956), *cert. denied* 352 U.S. 844 (1956).

(4) At the trial, Tom testified that Kaneshiro had admitted to him that the suitcase contained pistols, and a customs agent, Piper, was permitted to relate a statement made to him by Ekita during interrogation in a customs search that he, Ekita, had been present at the airport meeting with Kaneshiro, Loo and Tom. Appellants argue that these "admissions" were not supported by substantial independent corroboration showing a corpus delicti, and thus it was reversible error to admit them into evidence.

The purpose behind the general rule that an accused may not be convicted on his own uncorroborated confession is ". . . to prevent 'errors in convictions based upon untrue confessions alone,' . . ." *Smith v. United States*, 348 U.S. 137,153 (1954). The corroboration requirement applies to mere admissions when

". . . the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case." *Id.* at 155. The Court added, by way of footnote, that "[a]dmissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated." *Id.*, n. 3.

Keeping the *Smith* guidelines in mind, we hold that the statements made by the appellants were not of the type requiring independent corroboration of corpus delicti to be admissible. Kaneshiro's remark that the suitcase contained guns was made, not to an official, but to Tom, an unwitting accomplice, thereby providing "a strong inference of reliability." Ekita's statement was made to a customs agent, but, in view of the extensive nature of Ekita's proven participation in the crime, the admission, if such it can be called, did not "embrace an element vital to the Government's case." In any event, we think

that there was evidence, independent of the appellants' statements, sufficient to show that an offense had been committed. Additionally, the fact of the movement of the pistols in foreign commerce is established beyond doubt by the inscriptions in the metal on each of the gun handles.[3] Obviously, the pistols could not be manufactured in Connecticut and be found in Japan without having moved in foreign commerce. That appellants had no license as required by §902(a) is undisputed.

Closely connected to the above issue is Ekita's contention that his statement to Agent Piper should not have been admitted because it was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). One of the warnings required by *Miranda* is that the suspect shall be informed of his right to have an attorney appointed for him in the event

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[3]"Colt TTPT
S.A. Manufacturing Company
Hartford, Connecticut USA"

the suspect is indigent. *Id.* at 473. Ekita was not informed of this right before Piper commenced interrogating him. Assuming, without deciding, that Ekita's statement should not have been received in evidence, we hold that, in view of the abundance of other evidence implicating Ekita as a member of the conspiracy, any possible error in admitting the statement was harmless beyond a reasonable doubt under the teaching of *Harrington v. California*, 395 U.S. 250 (1969). See *United States v. Higuchi*, 437 F.2d 835,837 (9th Cir. 1971).

(5) Here, applicants object to the court's receiving into evidence, at the Government's request and over objection by the defense, an extrajudicial written statement made by Tom to Agent Piper after appellants had been arrested. The statement was actually a transscribed interview consisting of questions by Piper and answers by Tom. Appellants maintain that the introduction of the transcript violated the rule of evidence

that prior consistent statements cannot be used to support one's own unimpeached witness.

While appellants have correctly stated the general rule, *Johnson v. United States*, 347 F.2d 803,805-6 (D.C. Cir. 1965); 4 WIGMORE, EVIDENCE §1124 (3d ed. 1940), such a rule is not controlling in the instant case. "Where a cross-examiner has endeavored to discredit a witness by prior inconsistent statements, it is sometimes permissible to offset the damage by showing prior consistent utterances." *Schoppel v. United States*, 270 F.2d 413,417 (4th Cir. 1959). That is essentially the situation here. Before Tom's written statement had been introduced or received in evidence, defense counsel extensively attacked the statement and, in an unfair attempt to ferret out inconsistencies where none existed, repeatedly asked Tom about certain answers given by Tom during the interview without pinpointing the specific questions to which Tom was responding. On

the record before us, we see no valid reason why appellants should be allowed to argue that the court erred in admitting the very statement which they themselves so roundly attacked. For that matter, the trial judge was correct in saying that he had no choice but to admit the statement, as it was the only way in which the prejudicial effect of defense counsel's conduct could be neutralized.[4] A trial judge has a broad discretion in such matters. *Cf. Goings v. United States*, 377 F.2d 753,762 (8th

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[4]The Court: . . .

And, in this Court's own observation and this Court's view, he [defense counsel] has misconstrued many of the statements of the witness and attempted to indicate an impression of inconsistency where none existed. I don't think I can cure that without letting the document going (sic) into evidence. It has nothing new; it was completely covered. The only reason it could be brought up would be to argue.

And, because of the misleading, as I see it, impressions given by the questions of counsel, I believe that the

Cir. 1967). On these facts, we cannot say there was an abuse of that discretion, and even if there was, it was harmless under Rule 52(a), FRCrimP.

(6) On two occasions, the trial judge refused to grant appellants' motions for a mistrial. The first motion came after Agent Piper had stated that Ekita was known to be involved in the local underworld; the second came after the Japanese Police Inspector who had seized the pistols testified that the

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Government's offer is well taken. Ordinarily, I wouldn't allow it in evidence, but it's the same thing that has been going over and over again. It has been hammered and hammered and hammered and hammered, and, because of that, I think it's better to let the jury have the statement and then see if he arguments of counsel about whether he did or didn't make a misstatement by those words are true, rather than leaving it to argument as to what he said in the statement when he statement isn't before the jury.

So I will permit it in evidence. You may have a continuing objection to it." [R.T.303].

guns "were smuggled into Japan illegally." Appellants now maintain that the court erred in denying these motions. Both of the answers objected to came in response to pointed questions asked by defense counsel. The motions for a mistrial were, therefore, properly denied. *United States v. Parhms*, 424 F.2d 152,156 (9th Cir. 1970), *cert. denied* _____ U.S. _____. In addition, the Police Inspector's remark was stricken from the record at defense counsel's request.

(7) Finally, appellants assign error to the trial court's refusal to give their requested instruction that Tom's "uncertain" identification of Ekita as one of the principals at the airport meeting should be viewed with caution. The requested instruction was essentially an order to the jury to acquit Ekita if there was reasonable doubt as to Tom's identification of him at the airport. Such an instruction failed to take into account the numerous other overt acts linking Ekita to the conspiracy. There

was no error in failing to give this instruction.

Other contentions urged by the appellants have been thoroughly considered and found to be without merit.

FINDING NO ERROR, WE AFFIRM.

PROOF OF SERVICE BY MAIL
1013a and 2015.5 C.C.P.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 496 South San Vicente Boulevard, Los Angeles, California 90048, I served the within PETITION FOR WRIT OF CERTIORARI (Kaneshiro, et al., v. United States of America) on the following named party by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in the City of Los Angeles, California, addressed to said parties at the address as follows:

Robert K. Fukuda
U.S. Attorney General
District of Hawaii
U.S. District Courthouse
Honolulu, Hawaii

and

United States Court of Appeal
Ninth Judicial District Circuit
U.S. Court of Appeals and
Courthouse Building
7th and Mission Streets
Post Office Box 547
San Francisco, California 94101

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 4, 1971, at Los Angeles, California.

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No. 71-491

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD KENICHI KANESHIRO, A/K/A RICKARD HIGA, AND GEORGE EKITA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Hawaii, petitioners were convicted of having transported firearms in foreign commerce without a license and of conspiracy to commit that offense, in violation of 15 U.S.C. (1964 ed.) 902 (a). The court of appeals affirmed in a lengthy opinion (Pet. App. A 1-19) which fully answers each of petitioner's various claims (Pet. 3-4) and on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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